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January 23, 2003

BY ELECTRONIC SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: WC Docket No. 02-384; Notification of Oral *Ex Parte*

Dear Ms. Dortch:

This letter provides notice of an oral *ex parte* communication initiated by Victoria Schlesinger of the Wireline Competition Bureau Staff and me regarding the comments filed by Xspedius Management Co., LLC (“Xspedius”) in the above referenced proceeding. Specifically, Staff requested clarification regarding the difference between (1) the transport and termination facility and usage charges related to local voice traffic and (2) charges associated with traffic bound for Internet Service Providers (“ISPs”).

Transport and termination facility and usage charges related to local voice traffic enable Xspedius to recover the costs placed on the Xspedius network by Verizon. As a general matter, Verizon hands off local voice traffic to Xspedius at an Xspedius collocation arrangements within a Verizon central office. From the collocation arrangement, Xspedius provides transport to Verizon in order to deliver the call generated on the Verizon network. As Xspedius has noted, the Commission’s rules expressly permit all local exchange carriers to recover from the cost causer – in this case Verizon – “the costs of the proportion of trunk capacity used by [Verizon] to send traffic” to end users on the Xspedius network.¹ The Commission recently confirmed this longstanding rule in the *Virginia Arbitration Proceeding*, noting that “all LECs are obligated to bear the cost of delivering traffic originating on their

¹ 47 C.F.R. § 51.709(b).

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networks to interconnecting LECs' network for termination."² In spite of these clear directives by the Commission, Verizon continues to withhold this compensation from Xspedius, and as such, there can be no doubt that Verizon has not and cannot satisfy item 13 of the competitive checklist.³

In its January 22, 2003 *ex parte* ostensibly filed to provide further information on a "billing dispute with Xspedius," Verizon makes no effort to dispute Xspedius' proper billing for transport and termination facility and usage charges. Rather, Verizon attempts to gloss over its unilateral withholding of payment from Xspedius on grounds that it should be addressed through "negotiation" or "litigation."⁴ The question is not whether or to what extent Xspedius has other remedies available to it, rather the question in this proceeding is whether Verizon has complied with the competitive checklist and other requirements of section 271. The answer is a resounding "no."

Verizon does not even dispute that it has unilaterally refused to pay Xspedius for transport and termination facility and usage charges. Section 271 places the burden of proof on Verizon to demonstrate checklist compliance, and Verizon has failed to do so with regard to checklist item 13. Verizon concedes as much in its January 22, 2003 *ex parte*. Section 271 simply provides no loophole for Verizon to escape checklist compliance due to the availability of other remedies or the existence of alleged "significant past due balances."⁵ More importantly, the Commission under no circumstances may create – let alone enforce – any such loophole. This adjudication involves whether Verizon is in compliance with Section 271. Verizon quite simply is – and remains – in violation of checklist item 13 of Section 271, and the Commission must therefore reject Verizon's application.

Charges associated with traffic bound for ISPs are separately accounted for in Xspedius' comments. As demonstrated in Xspedius' comments, there can be no doubt that Verizon's unilateral decision to withhold compensation for this traffic requires this Commission to reject Verizon's application, at least for the District of Columbia and Maryland, as contrary to the public interest for at least two reasons.

² *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket 00-218, et al., Memorandum Opinion and Order, ¶ 67 (rel. July 17, 2002) (citation omitted).

³ 47 U.S.C. § 271(c)(2)(B)(xiii).

⁴ Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 02-384, at 1 (Jan. 23, 2003)

⁵ *Id.*, 2.

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First, Verizon mischaracterizes Xspedius' interconnection agreements for the District of Columbia and Maryland, both of which require the payment of reciprocal compensation for ISP-bound traffic, and neither of which have been amended by the parties to reflect this Commission's *ISP Remand Order*, 16 FCC Rcd 9151 (2001) (subsequent history omitted). Verizon's refusal to pay monies owed under existing interconnection agreements simply "because it can" demonstrates that grant of its application would be contrary to the public interest.

Second, Verizon's *ex parte* demonstrates its refusal to implement reasonably the *ISP Remand Order*. Verizon's argument that Xspedius is a "new entrant" to Maryland for purposes of the *ISP Remand Order* is demonstrably false. Paragraph 81 of the *ISP Remand Order*, on which Verizon relies, provides as follows:

Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer. Second, unlike those carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans.⁶

Xspedius purchased essentially all of e.spire's Maryland assets, including its customer base and interconnection agreement (as Verizon concedes). As such, Xspedius stands in the shoes of e.spire as a carrier serving existing customer and operating under an "existing interconnection agreement[]" in Maryland. Xspedius acquisition of e.spire assets in no way "exacerbated" the alleged "problem" of reciprocal compensation. The revenues in question were revenues that Verizon would have clearly anticipated having to pay to e.spire, or any successor, including Xspedius. Xspedius in no way "expand[ed]" the old regime into new markets.

Verizon is the only LEC that has taken this demonstrably incorrect position with Xspedius. Moreover, Verizon is the only LEC that has refused to implement the Commission's *ISP Remand Order* in accordance with the orderly processes outlined therein. Rather, Verizon has used every effort to unilaterally implement the *ISP Remand Order*, without regard to either the plain language of that order or the plain language of Verizon's various interconnection agreements with competitors, including those with Xspedius. The public interest prong of section 271 obligates the Commission to take account of Verizon's overall compliance with the

⁶ 16 FCC Rcd 9151, ¶ 81.

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rules and regulations. Verizon's efforts to implement unilaterally and incorrectly the *ISP Remand Order* demonstrates that grant of its application in the District of Columbia and Maryland is contrary to the public interest.

In accordance with the Commission's rules, this letter is being filed electronically in WC Docket No. 02-384. If you have any questions or need additional information, please contact me.

Sincerely,

/s/

Michael B. Hazzard

Counsel for Xspedius Management Co., LLC

cc: Victoria Schlesinger, WCB (by electronic mail)